



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

SEP 16 2016

Mr. Charles G. Snavelly  
Secretary  
Kentucky Energy and Environment Cabinet  
300 Fair Oaks Lane  
Frankfort, Kentucky 40601

Dear Mr. Snavelly:

The United States Environmental Protection Agency has completed its review of amendments to 401 KAR 10:026, 10:029, 10:030 and 10:031 of Kentucky's water quality standards regulations. The revisions were adopted as a result of the Kentucky Division of Water's (KDOW) triennial review of water quality standards (WQS), as required under the provisions of Clean Water Act (CWA or the Act) Section 303(c). The KDOW held a public hearing on September 24, 2015, regarding these revised water quality regulations. The revisions were considered by the legislative Administrative Regulation Review Subcommittee on December 9, 2015, and subsequently referred to the Senate Standing Committee on Natural Resources and Environment and the House Standing Committee on Natural Resources on January 6, 2016. Neither of these two committees met to consider these regulations within 30 days and therefore, all four regulations became effective February 5, 2016. The KDOW submitted new and revised water quality standards to the EPA by letter dated May 3, 2016, which was received by the EPA on May 4, 2016. The KDOW's submittal included a certification letter dated May 3, 2016, signed by John Horne, General Counsel for the Kentucky Energy and Environment Cabinet, which stated that the revisions were duly adopted in accordance with State law.

As laid out in the enclosed decision document, titled *Decision Document of the United States Environmental Protection Agency Review of Amendments to Kentucky's Water Quality Regulations at 401 KAR 10:026, 10:029, 10:030 and 10:031 Under § 303(c) of the Clean Water Act*, the EPA is approving all new and revised water quality standards as documented in all four regulations with the exception of the removal of the acute aquatic life criterion for selenium located in Table 1 at 401 KAR 10:031 Section 6. These revisions include, but are not limited to, amendments to add twenty streams or stream segments to the Outstanding State Resource Waters designated use, add twelve streams or stream segments to the Exceptional Waters category, reinstate the 5.0 ug/L aquatic life water column criterion for selenium, and establish an expiration date of November 1, 2019, for the fecal coliform standard for primary recreation in favor of the *E. coli* criterion. With respect to the removal of the acute aquatic life criterion for selenium, the EPA is taking 'No Action' at this time. The rationale for this is laid out in the enclosed decision document.

We would like to commend you and your staff for your continued efforts to protect and enhance Kentucky's waters during this rulemaking. We appreciate Kentucky's efforts throughout the water

quality standards development process. If you have questions regarding this action by the EPA, please contact me at 404-562-9345 or have a member of your staff contact Mr. Joel Hansel 404-562-9274.

Sincerely,

A handwritten signature in black ink, appearing to read "J. D. Giattina", written over a faint, larger signature.

James D. Giattina

Director

Water Management Division

Enclosure

cc: Peter Goodman, KDOW

*Decision Document of the United States Environmental Protection Agency Review of Amendments to Kentucky's Water Quality Regulations at 401 KAR 10:026, 10:029, 10:030 and 10:031 under § 303(c) of the Clean Water Act*

This document summarizes the EPA review of the revisions to Water Quality Regulations at 401 KAR 10:026, 10:029, 10:030, and 10:031 as adopted by the Commonwealth of Kentucky. These revisions were adopted as a result of Kentucky's water quality standards rulemaking. The state submitted the water quality standards (WQS) revisions by letter dated May 3, 2016, from R. Bruce Scott, Commissioner, Kentucky Department for Environmental Protection, to Heather McTeer Toney, Regional Administrator, Environmental Protection Agency, Region 4. The EPA received the revisions on May 4, 2016. The submittal to the EPA included a certification letter dated May 3, 2016, signed by John Horne, General Counsel for the Kentucky Energy and Environment Cabinet, which stated that the revisions were duly adopted in accordance with State law. A public hearing was held on September 24, 2015. In response to the public comments received, the state prepared a Response to Comments dated November 12, 2015. The revisions were considered by the legislative Administrative Regulation Review Subcommittee on December 9, 2015, and subsequently referred to the Senate Standing Committee on Natural Resources and Environment and the House Standing Committee on Natural Resources on January 6, 2016. Neither of these two committees met to consider these regulations within 30 days and therefore, all four regulations became effective February 5, 2016.

Additions to the Commonwealth's water quality standards regulations are shown underlined below, while deletions to the regulations are shown with strikethrough as necessary. As discussed more fully below, where the EPA has determined that the Commonwealth's rule revisions are themselves new or revised WQS, the EPA has reviewed and acted on these revisions pursuant to Section 303(c) of the Clean Water Act (CWA).<sup>1</sup> Section 303 of the CWA, 33 U.S.C. § 1313, requires states to establish WQS and to submit any new or revised standards to the EPA for review and approval or disapproval. The EPA's implementing regulations require states to adopt water quality criteria that protect the designated use. See 40 C.F.R. § 131.11(a). Such criteria must be based on a sound scientific rationale, and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use. In addition, the EPA's regulations require that in establishing criteria, a state shall consider WQS of downstream waters and shall ensure that its WQS provide for the attainment and maintenance of WQS of downstream waters. See 40 C.F.R. § 131.10(b).

A state's submission of water quality criteria must include (1) the methods used and analyses conducted to support water quality standards revisions, (2) water quality criteria sufficient to protect the designated uses and (3) a certification by the State Attorney General or other appropriate legal authority within the state that the water quality standards were duly adopted pursuant to state law. See 40 C.F.R. § 131.6.

Based on the review of the State's submittal, the EPA has determined that the new and revised standards listed below are consistent with 40 C.F.R. Part 131 and Section 303 of the CWA. Therefore, the EPA is approving the following new and revised WQS:

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<sup>1</sup> The EPA has provided FAQs on "What is a New or Revised Water Quality Standard Under CWA 303(c)(3)?" at <http://water.epa.gov/scitech/swguidance/standards/cwa303faq.cfm>. The link provides detailed information of such analysis.



- Revisions to 401 KAR 10:026, Section 5. Table B to add, modify or delete surface water intakes for domestic water supply use.
- Revisions to 401 KAR 10:026, Section 5. Table C to add or modify Outstanding State Resource Water designations for 20 streams or stream segments.
- Revisions to 401 KAR 10:030, Section 2. Table 2 to add or modify Exceptional Waters designations 12 streams or stream segments and clarify the extent of the Cold Water Aquatic Habitat designated use for the West Fork Red River.
- Revisions to 401 KAR 10:031, Section 6. Table 1 to reinstate the 5.0 ug/L selenium chronic water column value and establish primacy of the selenium fish tissue criterion components wherever fish tissue data are available.
- Revisions to 401 KAR 10:031, Section 7.(1)(c) to set an expiration date of November 1, 2019, for the fecal coliform standard for the protection of primary contact recreation in favor of the *E. coli* criterion.

#### **New and Revised Standards that are Approved by the EPA:**

The Commonwealth adopted the following revisions, which are shown in underline (new provisions) and strikethrough (deleted provisions) in Appendices A-D:

#### **Revisions to 401 KAR 10:026, Section 5. Table B to add, modify or delete surface water intakes for domestic water supply use.**

The Commonwealth made changes to this table based on one of two rationales. First, the Commonwealth adjusted names and locations of surface water intakes for domestic water supply to align the listed segments with the National Hydrological Dataset. Second, the Commonwealth removed surface water segments or systems that are no longer used as surface water intakes because of regionalization or system-district purchase of finished water for distribution from another domestic water supplier or added surface water segments due to the presence of a new surface water intake. A copy of the table is contained in Appendix A of this document.

The addition of the domestic water supply use to those areas now containing surface water intakes allows for the protection of the current use of said waters. The modification of existing domestic water supply uses due to changes in the National Hydrological Dataset is consistent with the CWA in that the modification ensures that the designated use is correctly assigned. The removal of the domestic water supply use for waters no longer being used as a water supply is acceptable since the use is predicated on an intake being present. Therefore, these actions are consistent with the CWA and 40 CFR 131.

#### **Revisions to 401 KAR 10:026, Section 5. Table C to add or modify Outstanding State Resource Water designations for 20 streams or stream segments.**

The Commonwealth added 20 stream segments to the Outstanding State Resource Water designation due to the presence of federally listed Endangered and/or Threatened species. This designation is consistent with the requirements of 401 KAR 10:026 Section 3(2). A copy of the table is contained in Appendix A of this document. This classification provides additional protections and requirements and is consistent with the CWA and 40 CFR 131.

**Revisions to 401 KAR 10:030, Section 2. Table 2 to add or modify Exceptional Waters designations for 13 streams or stream segments.**

The Commonwealth added or modified 13 stream segments to the Exceptional Waters designation due to the presence of an exceptional or “excellent” biological community. This designation is consistent with the requirements of 401 KAR 10:030 Section 1(2)(a)3. A copy of the table is contained in Appendix C of this document. This classification provides additional protections and requirements and is consistent with the CWA and 40 CFR 131.

**Revisions to 401 KAR 10:031, Section 6. Table 1 to reinstate the 5.0 ug/L selenium chronic water column value and establish primacy of the selenium fish tissue criterion components wherever fish tissue data are available.**

The EPA considers Kentucky’s reinstatement of the 5.0 ug/L water column value for selenium to be a non-substantive change to the Commonwealth’s WQS. The EPA previously disapproved Kentucky’s removal of the 5.0 ug/L water column value for selenium. This disapproval, meant that the 5.0 ug/L water column value remained the applicable WQS for CWA purposes. 40 CFR § 131.21(c). The Commonwealth has now reinstated the 5.0 ug/L water column value so that its regulations are consistent with the currently applicable water quality criterion in Kentucky. While this reinstatement does not revise the currently applicable WQS, the EPA believes that it is reasonable to approve this non-substantive change to ensure public transparency as to which provisions of the Commonwealth’s regulations are effective for purposes of the CWA. The EPA’s approval of the non-substantive reinstatement of the water column value for selenium does not constitute an action on the underlying WQS.

The Commonwealth also established the primacy of the selenium fish tissue criterion components over the water column value when fish tissue data are available. This primacy is consistent with EPA’s recently published aquatic life criteria guidance for selenium. Additionally, the EPA has already completed consultation in Kentucky under the Endangered Species Act on this primacy concept and received a concurrence with a ‘No Likely to Adversely Affect’ determination on February 5, 2016. This revision is consistent with the CWA and 40 CFR 131.

**Revisions to 401 KAR 10:031, Section 7.(1)(c) to set an expiration date of November 1, 2019 for the fecal coliform standard for the protection of primary contact recreation in favor of the *E. coli* criterion.**

The Commonwealth has been in a state of transition between the fecal coliform indicator and the *E. coli* indicator for the protection of public health related to primary contact recreation. This revision will set an expiration date for the fecal coliform criterion. The *E. coli* indicator is one of EPA’s current recommended criterion for the protection of public health and is acknowledged by EPA to be a better indicator than fecal coliforms. This revision is consistent with the CWA and 40 CFR 131.

**Review of the Removal of the Acute Aquatic Life Criterion for Selenium**

Based on previous legal decisions in the Great Lakes Region, the Commonwealth removed the acute aquatic life criterion of 20 ug/L for selenium. The Commonwealth has adequately addressed



implementation issues with this removal. However, the EPA is still examining the need to consult on this deletion with the U.S. FWS under Section 7 of the Endangered Species Act. At this time, the EPA is taking No Action on this revision. Once the EPA has completed its analysis, the EPA will inform the Commonwealth of the status of this revision. Until that time, the 20 ug/L value remains in effect for CWA purposes.

### **Review of Non-substantive Revisions to Water Quality Standards**

With the exception of the revisions specifically addressed above, the EPA has determined that all the additional changes within 401 KAR 10:026, 10:029, 10:030 and 10:031 are editorial, non-substantive changes to Kentucky's EPA-approved water quality standards or are not new or revised water quality standards. The EPA approves the editorial, non-substantive changes as being consistent with the CWA and the EPA's implementing regulations. The EPA notes, however, that its approvals of these editorial, non-substantive changes do not re-open the EPA's prior approvals of the underlying substantive water quality standards. Appendices A-D of this document are the respective rules, indicating additions with an underline and deletions with strikeout.

### **Conclusion**

Based on the reasons outlined above, the EPA concludes that the requirements of the CWA and 40 CFR §131 have been met for the new or revised WQS. The EPA approves the revised standards addressed in this Decision Document pursuant to Section 303(c) of the CWA, with the exception of the removal of the acute criterion for selenium. The EPA is taking no action on the removal of the acute criterion for selenium.

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Date

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James D. Giattina  
Director  
Water Protection Division